

REPORTABLE (43)

TAPFUMANEYI ALIFANARI
v
THE STATE

SUPREME COURT OF ZIMBABWE
GUVAVA JA, UCHENA JA & KUDYA JA
HARARE: 27 MAY 2022

T. Chagudumba, for the appellant

T. Mapfuwa, for the respondent

UCHENA JA: This is an appeal against the judgment of the High Court Harare handed down on 21 November 2018 convicting the appellant of murder with actual intent as defined in s 47 (1) (a) of the Criminal Law (Codification and Reform) Act [Chapter 9:23] (the “Act”) and sentencing him to death. The automatic appeal is against the sentence of death. After hearing submissions from counsel for both parties we with their consent dismissed the appellant’s appeal and indicated that reasons would follow in due course. These are they.

In spite of the order having been granted with the consent of the parties’ reasons for the granting of that order are necessitated by the appellant having been sentenced to death which in terms of s 48 (2) (e) of the Constitution entitles him to an application for pardon or commutation of the penalty to the President, which requires the judgment of this Court. In terms of subs 2 (b) a final judgment of this Court is required for the execution of the death penalty. Section 48 (2) (b) and (e) provides for such circumstances as follows:

“(2) A law may permit the death penalty to be imposed only on a person convicted of

- murder committed in aggravating circumstances, and—
- (a) ---
 - (b) **the penalty may be carried out only in accordance with a final judgment of a competent court;**
 - (c) ----
 - (i) ----
 - (ii) ---
 - (d) ----
 - (e) **the person sentenced must have a right to seek pardon or commutation of the penalty from the President.** (emphasis added)

FACTUAL BACKGROUND

The appellant was charged with murder in terms of s 47 (1) (a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] in that he caused the death of Patrick Philemon who was his uncle. He was convicted on the common cause evidence that he had caused the deceased's death. His confirmed warned and cautioned statement which sets out in detail how the offence was committed reads as follows:

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“I admit the charge of murdering Patrick Philimon that is Criminal Appeal No. SC 36/20 On the morning of 10 December 2015, I was sitting at home facing the North and I saw Patrick Philimon who was sitting on a rock on the foot of a hillock. I stood up and went towards where he was. After walking for a short distance, I picked a piece of a metal that is used to stretch the fence in the field. I intended to use it to attack Patrick Philimon because we had a disagreement over his having chased me away from home. I continued with my journey towards where he was. When I got near him, I went round the hillock so that he would not see me and also that he would not suspect that there was someone drawing close to where he was. While I was behind the hillock, I became afraid of what I wanted to do. I then went to a Muzhanje tree that was nearby while thinking of what I should do. I gathered courage (encouraged myself) and went where Patrick Philimon was. I got to where he was while creeping stealthily behind him and struck him with the piece of metal three times on the head near the ear. Patrick Philimon stood up crying and said, ‘nephew forgive me’. I did not want to forgive him so I went on striking him with the piece of metal in the head until he fell down. As he was down, I struck him again about five times until I was satisfied that he was dead. I left this place and went back the same way I had come. I hid the piece of metal in the grass and went to the dam to wash my body and clothes, which were bloodstained. I put the clothes back on when they had dried and the bloodstains were no longer properly visible and went back home.”

At the appellant's trial, the statement was produced by the state with the consent of the appellant's counsel. The appellant admitted that he had written it in Shona on a piece of paper after which it was recorded in English and subsequently confirmed by a Magistrate. The appellant told the court *a quo* of how he led the Police to the scene of the murder and indicated where he had hidden the metal he used to murder the deceased which was recovered. The appellant admitted that he had had an adulterous affair with the deceased's wife and had as a result been ordered by the Headman's court to leave the deceased's homestead where he had been staying for several years after his return from Harare.

The court *a quo* convicted the appellant of murder with actual intent. It, after finding that the appellant had committed the murder in aggravating circumstances and that no mitigating factors which could justify the avoidance of the death sentence, had been established sentenced him to death.

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In terms of s 44 of the High Court Act [*Chapter 7:06*] the death sentence entitled the appellant to an automatic appeal. He, however, appealed against sentence only on the following grounds:

1. "In passing the death sentence, the court *a quo* misdirected itself in finding that there were aggravating factors and no extenuating circumstances.
2. The discrimination imposed by the Constitution on the imposition of the death sentence is unjustifiable in a democratic society like Zimbabwe."

In his heads of argument the appellant's counsel stated that after reading the judgment of this Court in *Moyo v The State* SC 29/21 he was abandoning the second ground of appeal. The appeal therefore proceeded on the first ground of appeal which attacked the

court *a quo*'s sentence on the basis that it had not taken into consideration the appellant's extenuating circumstances.

This Court, as is required by law and as was explained in the cases of *Moyo v The State* SC 29/21, *Mutero v The State* SC53/18, *S v Mubaiwa* 1992 (2) ZLR 362,365D, *Mupande v The State* SC 37/14 and *Ncube and Anor v The State* SC 58/14, must consider and determine the correctness of the conviction even if the appeal is against sentence only. After reading the record of proceedings in the court *a quo*, and considering the concession properly made by the appellant's counsel, regarding the propriety of the conviction, we were satisfied that the appellant was correctly convicted of murder with actual intent.

SUBMISSIONS BEFORE THIS COURT

Mr *Chagudumba* for the appellant sought to rely on the fact that the court *a quo* did not make findings on extenuating circumstances in its reasons for imposing the death sentence. After an exchange with the court he conceded that the law had since the coming into effect of the 2016 General Laws Amendment Act No 2 of 2016, changed and no longer requires a court to make findings on the existence of extenuating circumstances.

Mr *Mapfuwa* for the state submitted that since the appellant's counsel had made concessions on the appellant's grounds of appeal the appeal should be dismissed with the consent of both parties.

APPLICATION OF THE LAW TO THE FACTS

We were satisfied that the appellant had correctly abandoned his second ground of appeal because the alleged discrimination is provided for in s 48 (2) (c) and (d) of the Constitution which provides as follows:

- “(2) A law may permit the death penalty to be imposed only on a person convicted of murder committed in aggravating circumstances, and—
- (a) ---
 - (b) ----
 - (c) **the penalty must not be imposed on a person—**
 - (i) who was less than twenty-one years old when the offence was committed;**
 - or**
 - (ii) who is more than seventy years old;**
 - (d) **the penalty must not be imposed or carried out on a woman; and**
 - (e) ----. (emphasis added)

It is trite that the court’s duty is to interpret the law and the Legislature’s is to enact laws. The complaint about the alleged discrimination should therefore be directed to the Legislature.

As regards the first ground of appeal the appellant’s counsel correctly conceded that the law has changed and extenuating circumstances are no longer a determining factor on whether or not the death sentence should be imposed. Section 48 (2) provides that a death sentence can ‘be imposed only on a person convicted of murder committed in aggravating circumstances’. It does not mention extenuating circumstances.

Prior to its amendment by s 43 of Act 2 of 2016 s 337 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] provided for extenuating circumstances. It read as follows:

“337 Sentence of death for murder

Subject to section *three hundred and thirty-eight*, the High Court—

- (a) **shall pass sentence of death upon an offender convicted by it of murder:**
 - Provided that, if the High Court is of the opinion that there are extenuating circumstances** or if the offender is a woman convicted of the murder of her newly-born child, the court may impose
 - (a) a sentence of imprisonment for life; or
 - (b) any sentence other than the death sentence or imprisonment for life, if the court considers such a sentence appropriate in all the circumstances of the case.”

Section 337 of the Criminal Procedure and Evidence Act as amended by s 43 of the 2016 General Laws Amendment Act No 2 of 2016 no longer refers to extenuating circumstances. It now provides as follows:

- “(1) Subject to section 338, the High Court may pass sentence of death upon an offender convicted by it of murder **if it finds that the murder was committed in aggravating circumstances.**
- (2) In cases where a person is convicted of murder **without the presence of aggravating circumstances**, or the person is one referred to in s 338(a), (b) or (c), the court may impose a sentence of imprisonment for life, or any sentence other than the death sentence or imprisonment for life provided for by law if the court considers such a sentence appropriate in all the circumstances of the case.” (emphasis added)

Section 338 to which s 337 is subjected only provides for the persons on whom the death penalty shall not be imposed. It does not provide for extenuating circumstances. It provides as follows:

- 338** “The High Court shall not pass sentence of death upon an offender who—
- (a) was less than twenty-one years old when the offence was committed; or
 - (b) is more than seventy years old; or
 - (c) is a woman.”

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We were therefore satisfied that counsel for the appellant correctly conceded that extenuating circumstances are no longer a mandatory consideration in determining whether or not a death sentence should be imposed on a person convicted of murder.

Section 47 (2) to (5) of the Criminal Law (Codification and Reform Act) [Chapter 9:23] as amended by Act 3 of 2016, provides for what constitutes aggravating circumstances as follows:

- “(2) In determining an appropriate sentence to be imposed upon a person convicted of murder, and without limitation on any other factors or circumstances which a court may take into account, a court shall regard it as an aggravating circumstance if—
- (a) the murder was committed by the accused in the course of, or in connection with, or as the result of, the commission of any one or more of the following crimes, or

- of any act constituting an essential element of any such crime (whether or not the accused was also charged with or convicted of such crime)—
- (i) an act of insurgency, banditry, sabotage or terrorism; or
 - (ii) the rape or other sexual assault of the victim; or
 - (iii) kidnapping or illegal detention, robbery, hijacking, piracy or escaping from lawful custody; or
 - (iv) unlawful entry into a dwelling house, or malicious damage to property if the property in question was a dwelling house and the damage was effected by the use of fire or explosives; or
- (b) the murder was one of two or more murders committed by the accused during the same episode, or was one of a series of two or more murders committed by the accused over any period of time; or
- (c) **the murder was preceded or accompanied by physical torture or mutilation inflicted by the accused on the victim;** or
- (d) the victim was murdered in a public place or in an aircraft, public passenger transport vehicle or vessel, railway car or other public conveyance by the use of means (such as fire, explosives or the indiscriminate firing of a weapon) that caused or involved a substantial risk of serious injury to bystanders.
- (3) A court may also, in the absence of other circumstances of a mitigating nature, or together with other circumstances of an aggravating nature, regard as an aggravating circumstance the fact that—
- (a) **the murder was premeditated;** or
 - (b) the murder victim was a police officer or prison officer, a minor, or was pregnant, or was of or over the age of seventy years, or was physically disabled.
- (4) A person convicted of murder shall be liable—
- (a) subject to sections 337 and 338 of the Criminal Procedure and Evidence Act [Chapter 9:07], to death, imprisonment for life or imprisonment for any definite period of not less than twenty years, if the crime was committed in aggravating circumstances as provided in subsection (2) or (3); or
 - (b) in any other case to imprisonment for any definite period.
- (5) **For the avoidance of doubt, it is declared that the circumstances enumerated in subsections (2) and (3) as being aggravating are not exhaustive, and that a court may find other circumstances in which a murder is committed to be aggravating for the purposes of subsection (4)(a)**” (emphasis added)

The law on whether or not to impose the death sentence now depends on whether or not the murder was committed in aggravating circumstances.

On the appropriateness of the sentence imposed by the court *a quo* we considered that the appellant had deliberately set out to murder the deceased. The murder was therefore premeditated as his actions were prompted by the history of the relationship between him and

the deceased. When he became hesitant, he pondered about it and resolved to carry out his intent. On getting to where the deceased was, he stealthily approached and attacked the deceased from behind. He delivered several blows on the deceased's head. When the deceased asked for forgiveness, he resolved not to forgive him and carried on with his murderous attack until he was satisfied that the deceased had died. The post mortem report gave details of the multiple injuries the appellant caused. It was on this evidence that we were satisfied that the murder was as properly conceded by counsel for the appellant, committed in aggravating circumstances. The injuries as shown by the pictures of the deceased's body and the post-mortem report prove that the murder was, preceded or accompanied by physical torture or mutilation inflicted by the appellant on the deceased. Counsel for the appellant conceded that the nature of the injuries prove that the deceased was exposed to torture and mutilation before he died.

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It was for these reasons that we, with the appellant's counsel and respondent's counsel's consent, dismissed the appellant's appeal.

GUVAVA JA: I agree

KUDYA JA: I agree

Artherstone & Cook, appellant's legal practitioners.

National Prosecuting Authority, respondents' legal practitioners.